

NOV for this reason.

**H. THE MONITORING REQUIRED BY THE ORDER MODIFIES THE MS4 PERMIT WITHOUT A NOTICED HEARING**

The MS4 Permit contains a monitoring program (Monitoring and Reporting Program No. CI 6948) that was incorporated into the permit at the time of its adoption on December 13, 2001. This monitoring program is very detailed and requires, inter alia, mass emissions, water column toxicity, tributary, and other monitoring for a variety of constituents and over a detailed timeline.

The MS4 Permit is both a NPDES permit and waste discharge requirement ("WDR") issued by the Regional Board under the Porter-Cologne Act (see Water Code §§ 13370-13389). A NPDES permit and WDR cannot be issued or modified except through prior notice and hearing. Water Code § 13378. The Act further provides that only a Regional Board can modify a WDR, and that this function cannot be delegated to the executive officer. Water Code § 13223(a) ("Each regional board may delegate any of its powers and duties vested in it by [the Porter-Cologne Act] excepting only the following: . . . (2) the issuance, modification, or revocation of any water quality control plan, water quality objectives, or waste discharge requirement.")

The Order essentially creates a massive new addition to the MS4 monitoring program. The Order requires Petitioner to provide information on the sources of exceedances at each of the shoreline monitoring sites for which it is jointly responsible, provide details regarding dry weather discharge from the MS4 at each site, and evaluate the sources of exceedances, both upstream and in the proximity of the monitoring site.

The Order, however, was issued without notice and a public hearing. To the extent the Order requires Petitioner to expand its monitoring efforts, the Order constitutes a modification to the MS4 Permit without notice and hearing.

**I. THE NOV AND ORDER UNLAWFULLY IMPOSES ON PETITIONERS RESPONSIBILITY FOR THE DISCHARGES OF OTHERS**

The Order is based on the allegation that Petitioner is jointly responsible for the alleged exceedances. To the contrary, Petitioners are not responsible for the discharges of others and neither the Clean Water Act or the Porter-Cologne Act so provides. Petitioner is responsible solely for its own discharges.

**J. TECHNICAL DEFECTS**

Petitioner has requested that the Petition be placed in abeyance while we attempt to reach an amicable resolution with the Regional Board. Towards that effort, we are continuing to investigate and collect data related to the matters raised in the NOV and Order. At this time, the City is aware of the following discrepancies in the documents that giving rise to this Petition

The summer dry weather target of zero exceedance days was established using a reference system. A reference watershed and associated beach was chosen to set the number of allowable exceedance days to ensure that shoreline bacteriological water quality is at least as good as that of a largely undeveloped system. The point of the reference system approach is to account for natural variability in bacterial indicator background loading to the receiving water. This reference beach site at Leo Carillo Beach includes freshwater discharge from a natural creek (Arroyo Sequit) draining a watershed that is largely undeveloped—according to the Regional Board staff report for the SMBBB Dry Weather TMDL, the Arroyo Sequit Canyon is approximately 12 square miles and 98% open space. The historical data used in establishing the reference was five years of shoreline monitoring data collected between 1996 and 2000. However, it should be noted that historically the shoreline monitoring sites were typically located 50 yards up coast or down coast of a storm drain or creek. Yet the Regional Board set the shoreline compliance points in the TMDL at the “wave wash” where the storm drain or creek empties and mixes with the receiving ocean water (“zero point.”) To quote from the Regional Board’s staff report, “Therefore, it is likely that historical shoreline monitoring data underestimates the average percent exceedance that would be observed at a beach if the sample were collected from the wave wash.”<sup>1</sup> Yet the staff report goes on to state that “[i]t is not the intent of this TMDL to require diversion of natural coastal creeks or to require treatment of natural sources of bacteria from undeveloped areas.”

Many of the monitoring sites under the SMBBB TMDL along the Malibu coast are located at the mouths of natural streams or canyons. Solstice Creek at Dan Blocker County Beach (SMB 1-10) is particularly noteworthy in that it was selected as one of six reference beaches for study by the Southern California Coastal Water Research Project in their recently published study Microbiological Water Quality at Non-Human Impacted Reference Beaches in Southern California during Wet Weather, Technical Report 495, December 2006 [www.sccwrp.org]. In this study reference beaches were defined as those beaches located at the mouth of undeveloped watersheds (>93% undeveloped) and whose bacterial contributions are minimally influenced by human activities. Yet the Notice of Violation cited SMB 1-10 Solstice Creek with 74 days of violations based on just five single-sample exceedance days and problematic geometric mean calculations (See Section 8.E, *supra*).

Monitoring at the reference beach, SMB 1-1, under the Coordinated Shoreline Monitoring Plan exhibited eleven (11) single-sample exceedance days during summer 2006 and zero (0) single sample exceedances during the summer of 2007 for a total of eleven (11) single-sample dry weather exceedance days over the two-summer period. During the same period Solstice Creek, SMB 1-10 exhibited six (6) single-sample exceedance days during summer 2006 and three (3) single-sample exceedance days during summer of 2007, two fewer exceedance days overall than the reference beach. Likewise, other monitoring sites in Malibu exhibited a better record of single-sample exceedance days than the reference beach during the two summers of 2006 and 2007: Walnut Creek, SMB 1-06, exhibited six (6) single-sample exceedance days over the two-summer period; Latigo Canyon, SMB 1-09 exhibited ten (10); Puerco Beach, SMB 1-11 exhibited five (5); Nicholas Creek, SMB 4-01 had just one(1); Malibu Colony, SMB MC-01 exhibited eight (8); and Malibu Pier, MC-03 had just five (5) single-sample exceedance days over the two-summer dry weather period. It is patently unreasonable to issue a Notice of Violation for sites that were cleaner than the reference beach used to set the standard and exhibited fewer exceedance days. In conjunction with the arguments raised in Section 8, *supra*, the Regional Board should address these alleged violations only after it has re-evaluated its

current TMDL, and devised an accurate regulatory mechanism that takes into account all current information regarding beach conditions.

Accordingly, the NOV and Order was not supported by substantial evidence. We anticipate that as the investigation continues, Petitioner may discover additional discrepancies or information that may give rise to additional legal issues that will be appropriate for review. City reserves its right to supplement this Petition in the event the investigation uncovers additional information relevant to these matters.

## **CONCLUSION**

For the foregoing reasons, Petitioner respectfully submits that the issuance of the subject NOV and Order was improper, inappropriate, unlawful, and not supported by substantial evidence. Petitioner respectfully requests that the State Board grant this petition and review the Regional Board's action in issuing the NOV and Order.

## **REQUEST TO HOLD PETITION IN ABEYANCE**

Pursuant to 23 Cal. Code Regs. §2050.5, petitioner respectfully requests that this Petition be held in abeyance while the petitioner pursues resolution of this matter with the Regional Board.

Dated: April 3, 2008

Respectfully submitted,  
CITY OF MALIBU



By: CHRISTI HOGIN  
LAUREN B. FELDMAN,  
JENKINS & HOGIN, LLP  
Attorneys for Petitioner,  
CITY OF MALIBU

Appendix:  
Exhibit A: Notice of Violation  
Exhibit B: Order

# **EXHIBIT "A"**

**NOTICE OF VIOLATION (ORDER NO 01-182 AS AMENDED BY  
ORDER NO. R4-2006-0074 AND ORDER NO. R4-2007-0042,  
NPDES PERMIT NO. CAS004001, WDID4B190190001)**



# California Regional Water Quality Control Board Los Angeles Region



Linda S. Adams  
Agency Secretary

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Arnold Schwarzenegger  
Governor

March 4, 2008

Mr. Bob Brager  
Public Works Director  
City of Malibu  
23815 Stuart Ranch Road  
Malibu, CA 90265-4861

VIA CERTIFIED MAIL

**NOTICE OF VIOLATION (ORDER NO. 01-182 AS AMENDED BY ORDER NO. R4-2006-0074 AND ORDER NO. R4-2007-0042, NPDES PERMIT NO. CAS004001, WDID 4B190190001)**

Dear Mr. Brager:

The California Regional Water Quality Control Board, Los Angeles Region (Regional Board) is the state regulatory agency responsible for protecting water quality in Los Angeles and Ventura Counties. To accomplish this, the Regional Board issues permits under the National Pollutant Discharge Elimination System (NPDES) as authorized by the federal Clean Water Act. On December 13, 2001, this Regional Board adopted the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. 01-182 (LA MS4 Permit), under which the City of Malibu is a Permittee.

## BACKGROUND

The LA MS4 Permit includes Discharge Prohibitions, Receiving Water Limitations, and a Monitoring and Reporting Program, among other requirements. Under Part 1, Discharge Prohibitions, the LA MS4 Permit requires that the Permittees "effectively prohibit non-storm water discharges into the MS4 [municipal separate storm sewer system] and watercourses," except under limited circumstances, as specified in Part 1. Under Part 2, Receiving Water Limitations, the LA MS4 Permit prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives."

The LA MS4 Permit was subsequently amended on September 14, 2006 by Order No. R4-2006-0074 and on August 9, 2007 by Order No. R4-2007-0042 to implement the summer dry weather waste load allocations established in the Santa Monica Bay Beaches Bacteria Dry Weather Total Maximum Daily Load (TMDL) and the Marina del Rey Harbor Mothers' Beach and Back Basins Bacteria TMDL. The summer dry weather requirements were incorporated in the LA MS4 Permit as specific Receiving Water Limitations (RWLs) for fecal indicator bacteria in Parts 2.5 and 2.6, and a supporting specific prohibition on discharges from the MS4 that cause or contribute to exceedances of the bacteria RWLs.

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The Permittees collectively discharge urban runoff and storm water from the MS4 to the Santa Monica Bay, a navigable water of the United States, under the provisions and requirements of the LA MS4 Permit. These discharges, as demonstrated via shoreline water quality monitoring, contain total coliform, fecal coliform, enterococcus and other pollutants, which degrade water quality and impact beneficial uses of the receiving waters at beaches along Santa Monica Bay. These bacterial indicators are defined as wastes under the California Water Code (CWC § 13000 et seq.).

### **VIOLATIONS OF RECEIVING WATER LIMITATIONS**

The City of Malibu is hereby notified that technical staff has concluded that Malibu is in violation of waste discharge requirements established in Board Order No. 01-182 as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042, and has therefore violated CWC § 13376, and is subject to liability pursuant to CWC § 13385.

The data submitted in the Permittees' shoreline monitoring reports for the summer dry weather compliance periods, beginning on September 14, 2006 through October 31, 2006 and April 1, 2007 through October 31, 2007, reveal violations of the RWLs set forth in Part 2.5 of Order No. 01-182 as amended by Order No. R4-2006-0074 and Order No. R4-2007-0042. These violations occurred at 12 shoreline monitoring sites located along Santa Monica Bay beaches to which the City of Malibu discharges via the MS4, on 493 days, which included 836 instances where the bacteria water quality objectives set to protect water contact recreation were exceeded. These violations are summarized in Table 1, detailed in the attachments, and incorporated herein by reference. The City of Malibu is jointly responsible for violations at these monitoring sites along with the other Permittees with land area within the watersheds draining to these sites.

### **CIVIL LIABILITY**

Pursuant to CWC § 13385, the City of Malibu is subject to penalties of up to \$10,000 for each day in which a violation of RWLs occurs. These civil liabilities may be assessed by the Regional Board beginning with the date that the violations first occurred, and without further warning. The Regional Board may also request that the State Attorney General seek judicially imposed civil liabilities of up to \$25,000 for each day in which a violation occurs, or injunctive relief, pursuant to CWC §§ 13385 and 13386. The City of Malibu may also be subject to penalties pursuant to other sections, and other forms of enforcement proceedings, in addition to those described above.

To ensure that the causes of the violations are identified and abated, enclosed herewith, please find an Order directing the City of Malibu to submit a variety of reports pursuant to CWC § 13383. Specifically, these reports shall provide an evaluation and documentation of the causes of these violations, remedial actions to date, and the City's plans for additional corrective and preventative actions to bring discharges from the MS4 into prompt compliance with the bacteria RWLs applicable to the Santa Monica Bay.

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Mr. Bob Brager

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March 4, 2008

If you have any questions regarding this matter, please contact me at (213) 576-6605, or alternatively, your staff may contact Mr. Carlos Urrunaga at (213) 620-2083.

Sincerely,

  
Tracy J. Egoscue  
Executive Officer

Enclosures: Table 1  
Attachments 9-16, 34, 41-43  
Order Pursuant to California Water Code Section 13383, dated March 4, 2008

cc: Ms. Jennifer Voccola, Environmental Program Analyst, City of Malibu  
Mr. Michael Levy, Office of Chief Counsel, State Water Resources Control Board  
Mr. Bruce Fujimoto, Storm Water Section, State Water Resources Control Board  
Mr. Eugene Bromley, U.S. EPA, Region 9

***California Environmental Protection Agency***



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TABLE 1

**MALIBU**  
**SUMMARY OF VIOLATIONS OF BACTERIA**  
**RECEIVING WATER LIMITATIONS FOR SUMMER DRY WEATHER**  
**ORDER NO. 01-182 AS AMENDED BY ORDERS R4-2006-0074 AND R4-2007-0042**

Site ID	Single Sample RWL Violations				30-day Geometric Mean RWL Violations			Total RWL Violations by Site	Total Days of Violations by Site
	Total Coliform	Fecal Coliform	Enterococcus	Total Coliform (Fecal:Total Coliform Ratio > 0.1)	Total Coliform	Fecal Coliform	Enterococcus		
SMB 1-06	0	1	2	1	0	0	0	4	2
SMB 1-07	1	1	4	1	0	0	45	52	47
SMB 1-08	0	1	1	1	0	0	0	3	1
SMB 1-09	1	1	4	1	0	0	32	39	34
SMB 1-10	0	1	4	3	19	0	71	98	74
SMB 1-11	0	0	1	0	0	0	0	1	1
SMB 1-12	11	9	32	8	129	33	197	419	197
SMB 1-13	1	0	4	1	0	0	41	47	41
SMB 4-01	0	1	0	1	0	0	0	2	1
SMB MC-01	0	1	0	0	4	1	13	19	14
SMB MC-02	7	25	9	18	28	37	8	132	62
SMB MC-03	0	0	3	1	0	0	16	20	19
<b>Totals</b>	<b>21</b>	<b>41</b>	<b>64</b>	<b>36</b>	<b>180</b>	<b>71</b>	<b>423</b>	<b>836</b>	<b>493</b>



## **ATTACHMENTS**

### **VIOLATIONS OF BACTERIA RECEIVING WATER LIMITATIONS BY SHORELINE MONITORING SITE**

**VIOLATIONS OF RECEIVING WATER LIMITATIONS FOR SUMMER DRY WEATHER PERIODS  
SEPTEMBER 14, 2006 - OCTOBER 31, 2006 AND APRIL 1, 2007 - OCTOBER 31, 2007  
ORDER 01-182 AS AMENDED BY R4-2006-0074 AND R4-2007-0042  
SITE ID SMB 1-06, WALNUT CREEK**

Date of Violation(s)	Single Sample Result (MPN/100 ml)				30-day Geometric Mean Result* (MPN/100 ml)		
	Total Coliform	Fecal Coliform	Enterococcus	Total Coliform (Fecal:Total Coliform Ratio > 0.1)	Total Coliform	Fecal Coliform	Enterococcus
<b>Basin Plan Limit</b>	<b>10000</b>	<b>400</b>	<b>104</b>	<b>1000</b>	<b>1000</b>	<b>200</b>	<b>35</b>
10/24/2006		1800	>2000	2700			
6/5/2007			290				
<b>Total Violations</b>	<b>0</b>	<b>1</b>	<b>2</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>

Notes: Site ID refers to sites identified in the "Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan," dated April 7, 2004.

\* Regional Board staff calculated the rolling 30-day geometric mean values presented.